

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY A. WILSON)	
Claimant)	
VS.)	
)	Docket No. 150,126
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF INSURANCE FUND)	
Insurance Carrier)	
)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

The claimant appealed the March 23, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Appeals Board heard oral argument on September 13, 2000.

APPEARANCES

Robert E. Tilton of Topeka, Kansas, appeared on behalf of claimant. Scott M. Gates of Topeka, Kansas, appeared on behalf of respondent and its insurance carrier. There was no appearance by the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopts the stipulations listed in the Award. Furthermore, the parties agreed in their briefs and during oral argument to the Board that the respondent ceased paying claimant's fringe benefits on October 3, 1990. Accordingly, claimant's average weekly wage increased from \$363.69 to \$409.45 and the compensation rate changed from \$242.47 to \$272.98.

ISSUES

In the Award entered March 23, 2000, Judge Benedict awarded claimant permanent partial disability compensation based upon a work disability. Judge Benedict averaged a 17.6 percent loss of wage earning ability with a 27.5 percent loss of access to the open labor market to find a 22.55 percent work disability. Claimant argues she is entitled to an award based upon a permanent total disability or, in the alternative, a higher work disability award. Respondent admits claimant is entitled to an award based upon a work disability, but denies claimant is permanently and totally disabled. The sole issue for determination by the Appeals Board concerns the nature and extent of claimant's disability, including, whether claimant is permanently and totally disabled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds that the Award entered by the ALJ should be modified to a permanent total disability award.

Permanent total disability exists when an employee, on account of his or her work related injury, has been rendered completely and permanently incapable of engaging in any type of substantial, gainful employment. K.S.A. 44-510c(a)(2) (Ensley).

An injured worker is permanently and totally disabled when she is "essentially and realistically unemployable." Wardlow v. ANR Freight Systems, 19 Kan. App. 2d 110,113, 872 P.2d 299 (1993). The injuries claimant suffered do not raise a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2); therefore it is the responsibility of the trier of fact to determine the existence, extent and duration of an injured worker's incapacity. Wardlow, at 112.

The "existence, extent and duration of an injured workman's incapacity is a question of fact for the trial court to determine." Boyd v. Yellow Freight Systems, Inc., 214 Kan. 797, 803, 522 P.2d 395 (1974). It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trial court must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 785, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Respondent argues that claimant is not entitled to a permanent total disability award because claimant's condition is the result of her deconditioning and not the work related injuries. It is significant that claimant, who was injured on July 27, 1990, had not worked for almost 10 years by the time of Judge Benedict's decision. Claimant's deconditioning is obviously a factor in her ability to access the open labor market, as pointed out both by respondent's medical expert, Joseph Sankoorikal, M.D., and by claimant's vocational

expert, Michael J. Dreiling. Furthermore, as claimant's counsel pointed out in his March 7, 2000 submission letter to Judge Benedict:

"Claimant has a height of 5' 3" and weighed 220 pounds at the time of her injury. Since that time, because of her inability to be active, she has now reached the weight of 260 pounds. This in itself would be a deterrent to being employable, it seems."¹

Where the permanency of a claimant's condition does not result from a work related injury, a claimant's employer is not liable for permanent disability benefits. West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, Syl. ¶ 4, 859 P.2d 382 (1993). Further, when the injury is attributable solely to a personal condition of the employee, there can be no causal connection to the worker's employment, and the injury is not compensable. See, Baggett v. B & G Construction, 21 Kan. App. 2d 347, Syl. ¶ 2, 900 P.2d 857 (1995).

In Nance v. Harvey County, 263 Kan. 542, 952 P.2d 411 (1997), the Kansas Supreme Court held that the natural and probable consequence of a work related injury, including the effects of the normal aging process on those injuries, are compensable. "Where the passage of time causes deterioration of a compensable injury, the resulting disability is compensable as a direct and natural result of the primary injury." Nance, at 550.

Claimant testified that she considered her back and left shoulder to be worse now because, in addition to the weakness and decreased motion she had before, she now has additional pain. She also has pain in both her upper and lower extremities, including pain in her elbows, wrists and hands with decreased strength bilaterally. Claimant testified that she was not physically able to work. She has not worked since her work related accident. When she sought to return to work for respondent she was refused. Since then she has neither looked for work nor has she received any job offers.

Vocational expert Michael J. Dreiling, who interviewed claimant at her attorney's request, opined that claimant was unlikely to be able to return to substantial, gainful employment from a vocational standpoint. Mr. Dreiling did take into account claimant's deconditioning as a part of her overall vocational profile, because claimant's medical restrictions, in and of themselves, would not keep her from working. In addition to her medical restrictions, he noted claimant's lack of physical and vocational rehabilitation and the length of time since her injury as impediments to her becoming employed.

¹ Claimant's March 7, 2000, submission letter to the ALJ; see also Transcript of December 16, 1999, Regular Hearing at 11.

Conversely, respondent's vocational expert, Ms. Karen Crist Terrill, did not find claimant to be unemployable. Although she did not meet claimant in person, instead conducting her interview by telephone, she identified several sedentary jobs which she considered to be within all of the doctors' restrictions. Her list included administrative type jobs in the health care field, such as a ward clerk, and also identified companion aide and telemarketing as possibilities.

In this case the ALJ appointed Edward J. Prostic, M.D., to perform an independent medical examination of claimant. Dr. Prostic examined claimant on only one occasion, May 5, 1997, but he issued two reports. Both are in evidence, but his deposition was not taken. Dr. Prostic reviewed various medical records and he notes in his May 5, 1997 report that Dr. Gardner had diagnosed fibromyalgia. But thereafter Dr. Prostic never again mentions fibromyalgia or pressure points in either of his reports. It appears that Dr. Prostic was focused instead on claimant's low back complaints. In his first report, Dr. Prostic said this was "the area of greatest concern" and commented that "[s]he will likely require decompressive lumbar laminectomy." He recommended a new MRI of her low back be obtained. That was done and the results were sent to Dr. Prostic. In his supplemental report dated June 26, 1998, Dr. Prostic opined:

I have reviewed the MRI report from Open MRI of Kansas City, as well as additional medical records of Drs. Sankoorikal and McKinney. The spinal stenosis that I expected on Mary Wilson was not confirmed by MRI. Surgery, therefore, is not indicated. Permanent partial impairment is rated at 15 percent of the body as a whole for degenerative disk disease with restriction of motion and 5 percent of the left arm for complaints consistent with rotator cuff tendinitis of the shoulder. Combined functional impairment is 19 percent of the body as a whole. Appropriate work restrictions are as follows: avoid lifting weights greater than 40 pounds occasionally or 20 pounds frequently, avoid frequent bending or twisting at the waist, and avoid repetitious use of the left hand at or above shoulder height.

Dr. Sharon McKinney is claimant's current treating physician. She diagnosed claimant with fibromyalgia and said it was either caused or aggravated by claimant's work related injury. Dr. McKinney testified that claimant had 14 out of the 18 possible pressure points whereas only 11 are necessary for a diagnosis of fibromyalgia. Furthermore, claimant had these pressure points on both sides of her body and both above and below the waist which are also requirements for this diagnosis. Much is made of the fact that on March 7, 1996 Dr. McKinney opined:

. . . she [claimant] should not be doing heavy lifting which I further defined as five to ten pounds occasionally at the most, no repetitive activities either with upper or lower extremities. She will require a low stress working situation and that she's not able to do any extended physical activity, more than a half

hour with or without rest in the way of walking, standing, crawling, bending, stooping, pushing or pulling things. She cannot do captive sitting or standing.²

But in her deposition, Dr. McKinney said she now thinks claimant is totally disabled from any occupation. Upon cross examination, however, Dr. McKinney acknowledged that claimant could do extremely sedentary work that was not repetitive if she could move about frequently. As a result, respondent argues Dr. McKinney equivocates in her opinions. But the Board finds Dr. McKinney clarified in her deposition testimony that her opinion is that claimant reasonably could not be expected to work based upon her total medical condition. Dr. McKinney described claimant's current condition as stable, but with flare-ups, and said claimant will need future medical treatment. In her opinion, claimant is "totally disabled from any occupation as well as her regular occupation."³

Dr. Joseph Sankoorikal did not consider claimant to be permanently and totally disabled from her work injuries. He rated claimant's functional impairment at 5 percent for the whole body and assigned restrictions of light to medium work, which is occasional up to 50 pounds and frequently up to around 35 pounds. He recommended aquatic therapy and exercises, but said claimant was limited in her ability to perform those programs due to her asthma. His examination revealed claimant had a total absence of flexion and extension mobility due to pain. He considered claimant's pain complaints to be genuine and acknowledged that claimant's pain was not reduced over the time period he treated her. Dr. Sankoorikal admitted he did not examine claimant for fibromyalgia because he was asked to look at claimant's low back condition and that is what he looked at. He further acknowledged that although claimant had complaints consistent with pressure points for fibromyalgia he did not treat those areas because most of the time he just treats what the patient is sent to him for and claimant was sent to him for low back pain.

In the Award, the ALJ discounted the testimony of Dr. McKinney because her diagnosis of fibromyalgia "was not confirmed by the other physicians." However, neither Dr. Sankoorikal nor Dr. Prostin said claimant did not have fibromyalgia. Moreover, it appears to the Board that these two physicians were focused on the spine or musculoligamentous injury to claimant's low back and did not fully explore the possibility of fibromyalgia. Dr. Sankoorikal acknowledged that claimant had pain complaints at pressure points consistent with fibromyalgia. In addition, Dr. Prostin's first report noted that at least one of claimant's previous treating physicians, Dr. Garnder, had also diagnosed

² December 2, 1999 Depo. of Dr. McKinney at 9.

³ December 2, 1999 Depo of Dr. McKinney at 10.

fibromyalgia. Dr. Douglas Gardner was claimant's authorized treating physician in November of 1990.⁴

The ALJ further concluded that "Dr. McKinney's draconian restriction [sic] are inconsistent with the Claimant's previously demonstrated ability to walk one to two miles every other day, and of her being pain free." The Board's reading of claimant's 1990, 1992 and 1999 testimony does not suggest to us that claimant was ever pain free. For example, in 1992 claimant described her symptoms and her efforts to cooperate with her physician's recommendation that she walk for exercise as follows:

Q. Do you feel at this time you are able to work?

A. No, I don't.

Q. What problems are you having at this time from your injury?

A. I have the burning sensation in my right lower back, radiating down the right leg; a problem with my shoulder, aggravated by any type of physical type, you know. If I stand for long periods of time or walk for long periods of time or sit in anything other than a straight back chair it aggravates the problem, causes the burning sensation. And I wear a lift in my right shoe which helps support me because my leg has gotten shorter, keeps that weight off that one side.

Q. Other than numbness that runs down your leg, do you have any other problem with your leg?

A. The numbness is— no. The foot swells, my right foot swells up all of the time.

Q. Is the swelling as bad as it was when you first got hurt?

A. No. When I first got hurt I didn't feel it. I could not feel the leg, period. I do have feeling in the leg now where it hurts all of the time where I know it's swelling. I can, you know, tell that it's swollen.

Q. Do you feel that is an improvement from when you started seeing Dr. Wright?

A. Yes, it is.

Q. Do you have any pain or what pain do you have up the inside of your leg?

A. When the, when it goes down the back of my leg it goes — all depends on what I have done. If— it goes down the back of my right leg, goes all the way up the foot, up into the inner-side of my leg into my groin area.

Q. How often does that occur?

A. This all depends on if I'm up on a daily basis.

⁴ Transcript of June 26, 1992 Hearing on Respondent's Motion to Terminate Temporary Total & Application for Change of Physician at 3.

Q. But – you said it all depends on whether you are up. Do you mean–

A. I usually go – I can't be going walking – I go every other day walking. I go a mile or two miles a day. It causes the foot to swell and it causes burning which causes the pain to go down my leg and up into my groin. Washing dishes - I can't vacuum and stuff like that because – I don't know, it does something to my hip and my back makes it hurt real bad.

Q. What problems do you have with your hip?

A. It burns, it hurts. It's – I don't know what – it's like a something's there. I can't stand any pressure. I can't stand anybody to touch this side of my leg.

...

Q. What has happened as far as your weight is concerned since this injury?

A. Well, I have gained weight. Dr. Wright put me on a diet but the diet that he had me on I couldn't afford, you know, to pay for it each month. And when I – the few months I was on it I lost some weight, you know. It seems like with the weight coming off I was beginning to feel better, less pressure on this leg. But I couldn't continue to take it.

Q. Do you walk one to two miles every day?

A. Every other day. I was going one or two miles a day until my foot got real bad and he told me to back off, took me off the walk, not to walk as much, you know, to be limited in my walking.

Q. Can you walk – how far can you walk without stopping and resting?

A. Oh, I guess, I usually – if I'm walking a mile I usually take a couple of breaks because it starts pinching down on the nerve in my back.⁵

Placing greater weight on the opinions given by the most recent treating physician, Dr. McKinney, and by claimant's vocational expert, Mr. Dreiling, the Board finds claimant to be permanently and totally disabled due to the progression of her work related injuries and resulting overall medical condition.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated March 23, 2000, should be, and is hereby, modified as follows:

⁵ Transcript of June 26, 1992 Hearing on Respondent's Motion to Terminate Temporary Total & Application for Change of Physician at 9-13.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Mary A. Wilson, and against the respondent, State of Kansas, and its insurance carrier, State Self Insurance Fund, and the Kansas Workers Compensation Fund for an accidental injury which occurred July 27, 1990, and based upon an average weekly wage of \$363.69 through October 3, 1990, for 9.86 weeks of temporary total disability compensation at the rate of \$242.47 per week or \$2,390.75, followed by 90.61 weeks of temporary total disability compensation at the rate of \$272.98 per week, based upon an average weekly wage of \$409.45, or \$24,734.72. Thereafter, claimant is entitled to permanent total disability compensation at the rate of \$272.98 per week, up to the maximum of \$125,000.00, which is all currently due and owing and ordered paid in one lump sum less amounts previously paid.

Future medical treatment is ordered provided by respondent and the Kansas Workers Compensation Fund with Dr. Sharon McKinney.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Tilton, Topeka, KS
Scott M. Gates, Topeka, KS
John C. Peterson, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director